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and the Putative Class
8

9 UNITED STATES DISTRICT COURT
10 SOUTHERN DISTRICT OF CALIFORNIA
11

12 GAIL HAHN, individually and on behalf
of all other similarly situated California
13 Residents

14
15 Plaintiff,

16 v.
17

18 MASSAGE ENVY FRANCHISING,
19 LLC, a Delaware Limited Liability
Company,
20

21
22 Defendant.
23
24
25
26

Case No. 3:12-cv-00153-DMS-BGS

**FIRST AMENDED CLASS
ACTION COMPLAINT FOR:**

**(1) VIOLATION OF CAL. BUS.
& PROF. CODE § 17200 FOR
“UNLAWFUL” BUSINESS
PRACTICES**

**(2) VIOLATION OF CAL. BUS.
& PROF. CODE § 17200 FOR
“UNFAIR” BUSINESS
PRACTICES**

**(3) BREACH OF CONTRACT -
VIOLATION OF THE
IMPLIED COVENANT OF
GOOD FAITH AND FAIR
DEALING**

**(4) DECLARATORY RELIEF
PURSUANT TO THE
DECLARATORY
JUDGMENT ACT, 28 U.S.C. §
2201**

JURY TRIAL DEMANDED

1 Plaintiff Gail Hahn (“Plaintiff”) alleges as to herself based on her own
 2 experience, and as to all other allegations, based upon the investigation of counsel,
 3 which included, *inter alia*, a review of complaints, reports, advisories, press releases,
 4 and media reports about defendant Massage Envy Franchising, LLC (“Massage
 5 Envy” or “Defendant”).

6 **I. INTRODUCTION**

7 1. Massage Envy is a membership based massage franchise that allows its
 8 consumer members to receive one fifty minute massage per month, in consideration
 9 for a monthly fee of approximately \$60.00. When consumers are unable to schedule
 10 their monthly massages, all unused “pre-paid massages” accrue and can be redeemed
 11 by Plaintiff and Class members at any time after purchase. However, Defendant has
 12 inserted unconscionable provisions in its adhesion contract that require Plaintiff and
 13 Class members to continue to purchase additional monthly massages as a
 14 precondition to redeem the massages already purchased. When Class members
 15 cancel (the “Cancellation Class”) or cease payment for monthly purchases of
 16 additional massages when those charges become due (the “Arrears Class”), all pre-
 17 paid massages that have not been redeemed are summarily and irreversibly
 18 forfeited.¹

19 2. Massage Envy’s contractual forfeiture of pre-paid massages when
 20 Arrears Class members fail to make timely payments, constitute penalty liquidated
 21 damages within consumer contracts, as prohibited by California Civil Code §
 22 1671(c) and (d). As to all Class members, Massage Envy’s forfeiture of pre-paid
 23

24 ¹ As specified in paragraphs 29 and 30 below, the **Arrears Class** is defined as: “All
 25 California residents, from December 7, 2007 to the present, who were enrolled in a
 26 Massage Envy membership program and forfeited pre-paid massages because they
 27 did not keep their membership current by making timely payments.” The
 28 **Cancellation Class** is defined as: “All California residents, from December 7, 2007
 to the present, who were enrolled in a Massage Envy membership program and
 forfeited pre-paid massages because they cancelled their Massage Envy account.”
 When Plaintiff refers to “Class members” or the “Class”, she is referring to both
 classes, unless otherwise indicated.

1 massages is prohibited by California Civil Code § 1442, which requires contract
2 terms involving forfeiture to be “strictly interpreted against the party for whose
3 benefit it is created,” such that Defendant’s contract is unconscionable and
4 unenforceable under California Civil Code § 1670.5. These violations of law and
5 public policy breach Massage Envy’s implied covenant of good faith and fair
6 dealing, and are “unlawful” and “unfair” business practices violating California’s
7 Unfair Competition Law (the “UCL,” CAL. BUS. & PROF. CODE § 17200 *et seq.*) This
8 class action accordingly seeks restitution and/or reinstatement of forfeited benefits,
9 injunctive relief preventing the reoccurrence of Defendant’s improper conduct,
10 declaratory relief pursuant to the Declaratory Judgment Act, 28 U.S.C. §2201, and
11 such other relief as allowed by law or equity.

12 **II. JURISDICTION AND VENUE**

13
14 3. The San Diego Superior Court has jurisdiction over this action pursuant
15 to Article 6, § 10 of the California Constitution, California Business and Professions
16 Code § 17203, Civil Code § 1780(d) and Code of Civil Procedure §§ 382 and
17 410.10.

18 4. This Court has jurisdiction over the subject matter of this action
19 pursuant to the Class Action Fairness Act, 28 U.S.C. §§1332(d), 1446, and 1453(b).
20 Plaintiff alleges that Plaintiff and Class members are citizens of different states as
21 Defendant, and the cumulative amount in controversy for Plaintiff and the Class
22 exceed \$5 million, exclusive of interest and costs.

23 5. Venue is proper in this District pursuant to 28 U.S.C. §1391(a) and (c)
24 because many of the acts and transactions giving rise to the violations of law
25 complained of herein occurred in this District and because Defendant:

- 26 (a) conducts business itself or through agent(s) in this district, by providing
27 services to Class members located in this District; and/or
- 28 (b) is licensed or registered in this District; and/or

(c) otherwise have sufficient contacts with this District to justify Defendant being fairly brought into court in this District.

III. PARTIES

A. PLAINTIFF'S EXPERIENCE WITH DEFENDANT

6. Plaintiff Gail Hahn is, and at all times relevant hereto was, a resident of Lakeside, California, County of San Diego, and a citizen of California.

7. On or about September 13, 2008, Plaintiff signed a standardized contract with Massage Envy that provided for one \$59.00 massage per month. Plaintiff's contract with Massage Envy had an initial term of 12 months (from September 13, 2008 until October 13, 2009), with an automatic renewal clause that continued the contract month-to-month until cancelled.

8. As specified by the contract, Plaintiff was charged and paid for approximately twenty three (23) massages, once each month from September 2008 through August 2010. However, Plaintiff was able to redeem approximately two (2) of the massages that she purchased before attempting to cancel her membership on or about February 2009.

9. On or about February 2009, Plaintiff called her Massage Envy clinic to cancel her contract. However, monthly massage charges continued to appear on Plaintiff's credit card statement. On or about March 2009, Plaintiff was told by her Massage Envy clinic that they did not have record of Plaintiff's attempt to cancel, and that Plaintiff would have to request cancellation in writing. On or about March 2009, Plaintiff complied and sent a letter to her Massage Envy clinic requesting her contract be cancelled. Massage Envy refused to cancel Plaintiff's contract despite Plaintiff's clear compliance with the procedures provided by Massage Envy. Plaintiff subsequently refused to authorize further Massage Envy charges to her credit card. Defendant then forwarded Plaintiff's purported "debt" for collections activities. Plaintiff has been refused redemption of the massages she previously

1 bought and has accordingly experienced loss, cost, damage and expense as a direct
2 and proximate result of Defendant's practices as complained of herein.

3 10. Plaintiff's contract with Massage Envy does not contain an arbitration
4 clause.

5 **B. DEFENDANT**

6 11. Defendant Massage Envy is a Delaware Limited Liability Company
7 with its principal place of business at 14350 North 87th Street, Suite 200, Scottsdale
8 Arizona, 85260. Massage Envy is the franchisor and principal for all Massage Envy
9 clinics in California. Massage Envy contractually requires all the Massage Envy
10 clinics in California to include certain material terms in membership agreements,
11 including the requirement that Plaintiff and the Class "agree to pay [Massage Envy]
12 for the membership, goods and services according to the payment schedule," that
13 Plaintiff and the Class "may continue to redeem your pre-paid massages after the
14 initial term of the membership as long as your membership has been renewed and is
15 current" and that Plaintiff and the Class' memberships "must be active in order to
16 redeem any membership services including membership massages."

17 12. Massage Envy owns all of Plaintiff and the Class' accounts and
18 corresponding information, and permits Plaintiff and the Class to redeem their pre-
19 paid massages at any Massage Envy clinic in the nation. In addition, Massage Envy
20 maintains operational control over most, if not all, aspects of its California clinics,
21 including but not limited to, the "System Standards" applied through Massage
22 Envy's "Operations Manual." This Manual governs the standards, specifications,
23 operating procedures and rules for Massage Envy clinics including, all products and
24 services clinics can (and cannot) sell, pricing of goods and services, location (and
25 relocation) of clinics, hiring of real estate broker(s) and clinic lease or purchase
26 terms, staffing levels, employee qualifications and training protocols, dress and
27 appearance standards for employees, and marketing protocols. In addition, the
28

1 Massage Envy Franchise Agreement gives Massage Envy the right to cancel clinics'
2 Franchise Agreement if they do not continually maintain Massage Envy's prescribed
3 standards.

4 13. Massage Envy is the successor in interest to Massage Envy Limited,
5 LLC, founded as an Arizona LLC in 2002, that franchised the California clinics from
6 February 2003 through December 2009. In 2008, Massage Envy Limited LLC was
7 sold to Veria Network, a Texas subsidiary of the Essel Group, a multi-billion-dollar
8 consortium based in India. In January 2010, Veria sold Massage Envy Limited LLC
9 to Sentinal Capital Partners, a private equity firm headquartered in New York City.
10 In October 2012, Sentinal Capital Partners sold the Massage Envy franchise to Roark
11 Capital Group.

12 14. Dismissed Defendant Massage Envy, LLC ("Massage LLC") is a
13 Delaware Limited Liability Company with its principal place of business at 14350
14 North 87th Street, Suite 200, Scottsdale Arizona, 85260. At all times relevant to this
15 lawsuit, Massage LLC was and is the direct parent corporation of defendant Massage
16 Franchising, controlling each facet of Massage Franchising's business and
17 management operations including broad policy decisions, routine matters and day-to-
18 day functions.

19 **IV. SUBSTANTIVE ALLEGATIONS**

20 **A. ALLEGATIONS CONCERNING ALL CLASS MEMBERS**

21 15. Massage Envy describes itself as a "pioneer and national leader of
22 affordable massage and spa services." Massage Envy is the world's largest employer
23 of licensed/registered massage therapists, with more than 16,000 therapists providing
24 over 250,000 massages every week. Massage Envy claims to have provided over 30
25 million massages, in over 700 clinics in the United States, making it the nation's
26 largest massage chain. Massage Envy has over 1 million members at clinics in 44
27 states, with approximately 132 Massage Envy locations in California.
28

1 16. In 2002, Massage Envy created a massage business designed to mimic
 2 the “health club” membership model. However, unlike a health club, Plaintiff and
 3 Class members do not purchase *access to Massage Envy’s facilities*, but instead
 4 purchase a pre-paid, transferrable massage in exchange for a monthly fee ranging
 5 from \$49.00 to \$59.00. The “membership” aspect of Defendant’s business model
 6 arises from the recurring nature of Defendant’s charges, not from any exclusivity
 7 members receive to Massage Envy’s services. In fact, non-members can purchase
 8 anything from Defendant that Plaintiff and Class members can purchase.

9 17. When a prospective customer first visits a Massage Envy clinic, they are
 10 offered a massage at an introductory price. Immediately after the potential customer
 11 has received their massage and is in a relaxed (compromised) mental state,
 12 Defendant’s protocol is to offer the consumer a Massage Envy membership. The
 13 potential customer must sign Massage Envy’s standardized adhesion contract for
 14 recurring monthly massage purchases that is offered as a one-time, take it or leave it
 15 opportunity (the “Membership Agreement”).

16 18. Plaintiff and each Class member have signed a Massage Envy
 17 Membership Agreement for personal, family, or household purposes. The
 18 Membership Agreement for Plaintiff provides:

19 Your first monthly payment will be due on October 14, 2008 and then
 20 recur the same day each month hereafter until your membership expires
 or is terminated in accordance with this agreement.

21 * * *

22 Your membership is auto-renewable. Following the initial term, your
 23 membership will automatically continue on a month-to-month basis at
 \$59.00 per month until your membership is cancelled or terminated as
 provided by the terms and conditions in this agreement.

24 You have the entire term of the membership agreement to use all **pre-**
 25 **paid massages.** You may continue to redeem your pre-paid massages
 after the initial term of the membership as long as your membership has
 been renewed and is current.

26 * * *

27 Your membership services must be active in order to redeem any
 28 membership services including membership massages.

* * *

You agree to pay us for the membership, goods and services according to the payment schedule.

* * *

Canceling your membership. You may cancel this membership during the original term in the event that: (a) the member permanently relocates his or her residence more than a 25 mile radius from any Massage Envy clinic; or (b) a physician certifies that a member is permanently disabled or unable to avail himself or herself of massage services. All cancellation requests MUST be accompanied by written proof of relocation (i.e. Mortgage or Rental agreement, utility bill, car insurance, etc.) or submission of Doctor's note if medical reason is stated. Upon approval of your cancellation during the initial membership term, you will be relieved from making any future membership dues payments. ... You are responsible for any and all membership fees incurred until you cancel your membership in accordance with the terms of this agreement.

We reserve the right to terminate or deny reenrollment for an indeterminate amount of time if a customer has an unsatisfactory payment history.

(emphasis added).

19. Each Class member's Massage Envy Membership Agreement is identical or functionally identical in its material terms. Even though the Membership Agreement does not expressly provide for forfeiture, Massage Envy uniformly interprets its Membership Agreement to provide that if a Class member has not paid all charges when due, and/or cancels their account, all "pre-paid massages" are forfeited. Even if Class members reinstate their Massage Envy account, Massage Envy does not permit Plaintiff and Class members to redeem their pre-paid massages without imposing unconscionable conditions, primarily the purchase of additional massages as a prerequisite to using massages already pre-paid. Similarly, when Class members cancel, all pre-paid massages are permanently forfeited, even if the member re-enrolls at a later date. In other words, Massage Envy gets paid but gives nothing in return. This is improper.

20. Massage Envy's Membership Agreement does not specifically provide for forfeiture of unused pre-paid massages when Plaintiff and Class members cancel and/or do not keep their account current by making timely payments. Instead, Massage Envy's Membership Agreement contains ambiguous terms that Massage

1 Envy misleadingly and impermissibly construes to compel forfeiture. However,
 2 pursuant to California Civil Code § 1442, Massage Envy is required to construe its
 3 Membership Agreement in a manner that would allow Plaintiff and Class members
 4 to somehow redeem their pre-paid massages in the future, or offer a refund. CAL.
 5 CIV. CODE § 1442 (“A condition involving a forfeiture must be strictly interpreted
 6 against the party for whose benefit it is created.”) Massage Envy’s forfeiture is
 7 against the public policy of the State of California.

8 21. Massage Envy’s forfeiture policies are unconscionable because they are
 9 inserted by Defendant in a contract of adhesion, with no opportunity for bargaining,
 10 that is presented immediately after Plaintiff and Class members have received a
 11 massage. In addition, Defendant’s forfeitures are against the public policy of the
 12 State of California, lack mutuality, are completely one-sided in favor of Massage
 13 Envy and shock the conscience.

14 22. Massage Envy’s practice of forfeiting pre-paid massages is the source of
 15 thousands of Internet complaints. Below is a small sample of complaints concerning
 16 Massage Envy’s forfeiture policies.

17 “Had the contract, credit card on file had expired, so was 3 mos. in arrears.
 18 Had 5 un-used massages that were already paid for and was told that in
 19 order to use them, I would have to pay the 3 months unpaid monthly fee
 20 (\$59×3) in order to use them. If I didn’t do that, I could not get the 5
 21 massages. I offered to pay the full, non-member price of \$98/massage in
 22 order to use that \$~300 credit and the answer was no! So I am stuck
 23 w/~\$300 already paid for massages that I can’t get, because I am not a
 24 current member!!! This is the worst business policy I have ever
 25 encountered!! NEVER SIGN A CONTRACT W/MASSAGE ENVY!!
 26 THEY ARE CROOKS!!!”²

27 “I signed up for a monthly contract at Massage Envy about 2 years ago.
 28 Today, I have about 15 unused massages because of my frequent travel and
 busy work schedule. The value of these massages at \$59 is \$885!!! If I
 cancel my membership, I lose all my pre-paid massages. How is this legal?
 I’m in California, a place where prepaid gift cards cannot expire, but CAN
 depreciate slowly. I assume Massage Envy is able to get away with this
 because of the way the charges/service is categorized, but I feel a lawsuit
 coming on. These types of billing practices aren’t exactly ethical.”³

² <http://massageenvyblows.com/miss-led/?success=1>

³ <http://massageenvyblows.com/illegal-contract-terms/>

1 “Contract called for Massage Envy to subtract the cost of one massage per
2 month from my credit card. The massage credit would not expire. I was
3 notified by massage envy that I had 4 massages paid for and to call for an
4 appointment to use them. I called for an appointment. They stated that my
5 credit card had just been declined to pay for the current month. I told them
6 that I had just lost my credit card and thusly had cancelled it and was
7 waiting for the arrival of my new card. Massage envy refused to supply me
8 with a massage even though four massage sessions had already been paid
9 for. They broke the contract by refusing to supply services that they had
10 been paid for. The police stated that it was a civil matter. They are now
11 using a collection agency to try and collect more money.”⁴

12 “Massage Envy charges a \$59 monthly membership fee for 1 massage per
13 month (If you don't use it in that month, they accumulate). [¶] I called to
14 cancel my membership and thought I had successfully done so, but realized
15 that my credit card was still being billed \$59 per month. I called to
16 complain and found out you have to go *into* the store to cancel. At that
17 point I had around 10 that I had paid for but hadn't used. Before getting
18 pissed and writing a letter, I came up with some ideas to whittle those
19 down, but the restrictions on what I could do with services I had already
20 PAID FOR were ridiculous: [¶] Transferring a session to treat a friend
21 would cost me an EXTRA \$10 on top of the \$59 I had ALREADY paid for
22 the session. [¶] Use 2 sessions toward a couple's massage (of which I would
23 be involved) would also cost me an extra \$10 to transfer one to the other
24 person to use (again, on top of the \$59 I had ALREADY paid). Otherwise,
25 the other person would have to pay the introductory rate of \$59. [¶] Placing
26 a hold on my account would restrict me from using ANY of the massages I
27 already PAID FOR during that "hold" period. [¶] Remember I had 10
28 sessions- that's \$590 I had already given to Massage Envy! I HAD to keep
my membership active (and thus pay each month and get additional
massages I didn't even need) in order to use my sessions. If I cancel, those I
didn't use would go to waste.

18 “Like everyone on this thread, I too was ripped off. Massage Envy wont
19 give me my prepaid massages until I pay another month of membership
20 before I cancel. I have been a member for 3 years and and its not like I was
21 locked into a 12 month membership contract. It was a month to month
22 agreement wherein I have 6 prepaid massages I have not used. There are a
23 lot of complaints about this same thing in this website and others like
24 this...”⁶

25 “I Joined Massage Envy when they first came to town, about 7 years ago I
26 think. Last year I was having physical issues and could not receive the
27 massages I had credit for. [¶] When I went to see them several months later
28

⁴ <http://www.ripoffreport.com/r/massage-envy/rockaway-New-Jersey-07866/massage-envy-REFUSED-TO-SUPPLY-MASSAGES-THAT-WERE-ALREADY-PAID-FOR-rockaway-New-Jersey-1023290>

⁵ <http://www.ripoffreport.com/r/Massage-Envy/nationwide/Massage-Envy-s-horrendous-cancellation-process-ridiculous-restrictions-for-services-you-994531>

⁶ <http://www.ripoffreport.com/r/Massage-Envy/high-point-North-Carolina-27265/Massage-Envy-Like-everyone-on-this-thread-I-too-was-ripped-off-They-wont-give-me-my-pre-980625>

1 to cancel contract, they informed me I had to give thirty-day notice in
 2 writing, which I did. I asked if I could use the massages already paid for
 3 after cancellation. They said NO. the fee I was paying entitled me to
 4 massages - one for each month - but was a membership fee, not prepaid
 5 massages. [¶] I think this is a rip-off and someone should initiate a class-
 6 action suit against them.”⁷

7 “I have been a member in Farmingdale NY and have ten massages saved up
 8 so I asked them to stop charging my account so I can catch up. They now
 9 told me that I will lose all ten in 30 days! I specifically asked this question
 10 when I signed up and they lied to me. [¶] If they are making money by
 11 charging and not providing a service, that is illegal. I hope the local person
 12 was misinformed, but she was pretty firm that they do steal members money
 13 in these cases and thats how they improve their profits. Disgusting!”⁸

14 “JUST GOT OFF THE PHONE w/CITIBANK IN NORTH DAKOTA RE:
 15 GETTING MY MONEY BACK FOR SERVICES NOT YET
 16 RENDERED. ALTHOUGH THEY DON'T HAVE ANY MESSAGE
 17 ENVYS UP THERE, THE REP IN THE DISPUTES DEPARTMENT
 18 SAID HE WAS "VERY FAMILIAR" WITH MESSAGE ENVY
 19 BECAUSE CITIBANK HAS RECEIVED SO MANY DISPUTES &
 20 COMPLAINTS AGAINST THEM!! THEY DEAL WITH TENS OF
 21 MILLIONS OF COMPLAINTS AGAINST TENS OF MILLIONS OF
 22 BUSINESSES EVERY YEAR, AND THIS GUY REMEMBERS, OUT OF
 23 ALL THESE VENDORS, MESSAGE ENVY??!! AND THAT'S JUST
 24 ONE REP AT ONE BANK!!”⁹

25 “[I]f your card on file expires you will be charged once they get the new
 26 card info, but you lose (permanently because you would have received a
 27 new card months earlier and had time to update the auto pays) the
 28 massages because your account wasn't current.”¹⁰

29 **B. ALLEGATIONS SPECIFICALLY CONCERNING THE** 30 **ARREARS CLASS**

31 23. When Plaintiff and Arrears Class members fail to keep their account
 32 current, they are no longer permitted to redeem their pre-paid massages until
 33 payment is made for additional massage(s) as they come due. If a member does not

34 ⁷ <http://www.ripoffreport.com/r/Massage-Envy/Vancouver-Washington-98665/Massage-Envy-Contract-ripoff-and-unused-massages-Vancouver-Washington-909855>

35 ⁸ <http://www.ripoffreport.com/r/Massage-Envy/Farmingdale-New-York-11735/Massage-Envy-YOU-LOSE-ALL-MASSAGES-YOU-SAVE-THIEVES-Farmingdale-New-York-908598>

36 ⁹ http://www.yelp.com/biz/massage-envy-spa-encino-2?sort_by=rating_asc

37 ¹⁰ http://www.yelp.com/filtered_reviews/p1rXIYAeOtgSTGZAy0nGog?fsid=CjhOhI0fo_u5L8AyXt vKMA&filtered_start=20

1 pay all past-due membership charges (which continue to accrue), they forfeit all pre-
2 paid massages. If the Arrears Class member never brings their account current AND
3 does not cancel in accordance with Defendant's onerous cancellation procedures,
4 they forfeit pre-paid massages AND continue to be assessed membership charges
5 each month as they come due, even though the charges are for massages that the
6 consumer *can never use*. This happened to Plaintiff. Defendant's continued billing
7 for additional massages to non-current accounts, where such massages cannot be
8 used by Plaintiff and the Class because their accounts are not paid current is
9 unconscionable pursuant to California Civil Code § 1670.5, and separately, void
10 liquidated damage clauses within the meaning of California Civil Code § 1671;

11 24. Arrears Class members' failure to make timely payments constitutes a
12 breach of the Membership Agreement. Massage Envy's forfeiture of purchased
13 massages are "liquidated damages" because they are triggered by Arrears Class
14 members' failure to perform the contractual covenant of timely payment, and
15 because Massage Envy's records allow computation of the dollar value of massages
16 forfeited.

17 25. Defendant made no attempt to determine what its damages would be in
18 the event of untimely payment by Arrears Class members. Instead, Defendant
19 interprets its adhesion Membership Agreement to require forfeiture as a method to
20 compel timely payment, penalize non-payment, and as a means to unjustly increase
21 revenue without having to provide massage services (i.e., as a means to generate
22 unfair profits).

23 26. Forfeiture is compelled without regard, and disproportionate to the
24 actual damages (if any) sustained by Massage Envy in the event of untimely
25 payment. This is because Massage Envy suffers no actual damage when consumers
26 fail to make timely payments pursuant to the Membership Agreement.

27. The value of the forfeited massages bear no relation to any damage that could reasonably be anticipated by Massage Envy, as Arrears Class members' failure to timely pay for *additional* massages when due, are separate obligations from *past, paid* massages. There is no justification for Massage Envy's forfeiture procedures other than to reap unjust profits at consumer expense.

28. Plaintiff and each member of the Arrears Class have paid Massage Envy for massages that they cannot redeem because their memberships with Defendant are no longer paid current.

V. CLASS ACTION ALLEGATIONS

29. Plaintiff brings this action as a class action pursuant to Federal Rule of Civil Procedure 23(a) and 23(b)(2) and 23(b)(3) for the following "Arrears Class" of persons:

All California residents, from December 7, 2007 to the present, who were enrolled in a Massage Envy membership program and forfeited pre-paid massages because they did not keep their membership current by making timely payments.

Excluded from the Arrears Class are all legal entities, Defendant herein and any person, firm, trust, corporation, or other entity related to or affiliated with any defendant, as well as any judge, justice or judicial officer presiding over this matter and members of their immediate families and judicial staff.

30. Plaintiff brings this action as a class action pursuant to Federal Rule of Civil Procedure 23(a) and 23(b)(2) and 23(b)(3) for the following "Cancellation Class" of persons:

All California residents, from December 7, 2007 to the present, who were enrolled in a Massage Envy membership program and forfeited pre-paid massages because they cancelled their Massage Envy account.

Excluded from the Cancellation Class are all legal entities, Defendant herein and any person, firm, trust, corporation, or other entity related to or affiliated with any

1 defendant, as well as any judge, justice or judicial officer presiding over this matter
2 and members of their immediate families and judicial staff

3 31. The members of the Class are so numerous that joinder of all Class
4 members is impracticable. While the exact number of Class members is unknown to
5 Plaintiff at this time and will be ascertained through appropriate discovery, Plaintiff
6 is informed and believes that there are thousands of members in the proposed Class.
7 Defendants require each of their California clinics to install Massage Envy's
8 proprietary software called "Millennium 2009" (or the current update), which
9 Massage Envy sublicenses to its California clinics. This software is used for
10 member management and accounting, point of sale, cash register, and credit card
11 processing functions. Massage Envy has independent, unlimited access to the
12 information generated and tracked by the computer systems of its California clinics,
13 including information generated from Millennium 2009 (or the current update).
14 Thus, Defendant can readily obtain information to identify members of the Class, as
15 well as the number of massages that Class members have forfeited, such that
16 members of the Class can be identified from records maintained by Defendant.

17 32. Each Class member paid Defendant a certain number of monthly
18 membership charges, from which the number of redeemed massages can be deducted
19 to determine Class-wide restitution and/or damages and/or reinstated massages as
20 maintained in Defendant's records.

21 33. Plaintiff's claims are typical of the claims of the other members of the
22 Class. All members of the Class have been and/or continue to be similarly affected
23 by Defendant's wrongful conduct as complained of herein, in violation of California
24 law. Plaintiff has no interests adverse to the Class.

25 34. Plaintiff will fairly and adequately protect the Class members' interests
26 and has retained counsel competent and experienced in consumer class action
27 lawsuits and complex litigation.
28

1 35. Defendant has acted with respect to the Class in a manner generally
2 applicable to each Class member. Common questions of law and fact exist as to all
3 Class members and predominate over any questions wholly affecting individual
4 Class members. There is a well-defined community of interest in the questions of
5 law and fact involved in the action, which affect all Class members. Among the
6 questions of law and fact common to the Class are, *inter alia*:

7 (a) Whether Defendant is party to membership agreements with Plaintiff
8 and the Class and/or are liable for the actions of Massage Envy's California clinics;

9 (b) Whether Defendant's contractual clauses requiring forfeiture of paid
10 massages are (void) liquidated damage clauses within the meaning of California
11 Civil Code § 1671;

12 (c) Whether Massage Envy was required pursuant to California Civil Code
13 § 1442 to interpret its Membership Agreement in a manner not compelling forfeiture;

14 (d) Whether Massage Envy's forfeiture provisions are procedurally and/or
15 substantively unconscionable under California Civil Code § 1670.5;

16 (e) Whether Defendants' contractual forfeiture of paid massages constitutes
17 "unlawful" or "unfair" business acts or practices under, *inter alia*, CAL. BUS. & PROF.
18 CODE §§ 17200, including:

19 (i) Whether Defendant's contractual forfeiture of paid massages
20 constitute "unfair" business practices because consumer injury outweighs any
21 countervailing benefits to consumers or competition, and because such injury could
22 not be reasonably avoided by consumers;

23 (ii) Whether Defendant's contractual forfeiture of paid massages
24 constitute "unlawful" or "unfair" business practices by violating established public
25 policy as embodied by California Civil Code §§ 1442, 1670.5 and/or 1671;

1 (iii) Whether Defendant's contractual forfeiture of paid massages
2 constitute "unfair" business practices because they are immoral, unethical,
3 oppressive, unscrupulous or substantially injurious to consumers;

4 (iv) Whether Defendant's business practices are "unfair" because the
5 gravity of the harm to Plaintiff and the Class outweighs the utility of Defendant's
6 forfeiture policy;

7 (f) Whether Defendant violated the implied covenant of good faith and fair
8 dealing by unreasonably and/or contrary to California law or public policy construed
9 its Membership Agreement to provide for forfeiture;

10 (g) The nature and extent of damages, equitable remedies, and injunctive
11 relief to which Plaintiff and the Class are entitled;

12 (h) Whether Plaintiff and the Class are entitled to declaratory relief
13 pursuant to the Declaratory Judgment Act, 28 U.S.C. § 2201, declaring that Massage
14 Envy's Membership Agreement does not entitle Defendant to forfeit Plaintiff and the
15 Class' pre-paid massages;

16 (i) Whether Plaintiff and the Class should be awarded attorneys' fees and
17 the costs of suit;

18 36. A class action is superior to all other available methods for the fair and
19 efficient adjudication of this controversy since joinder of all members is
20 impracticable. Furthermore, as the damages suffered by individual Class members
21 may be relatively small, the expense and burden of individual litigation make it
22 virtually impossible for Class members to individually redress the wrongs done to
23 them. There will be no difficulty in managing this action as a class action.

24 37. Defendant has acted on grounds generally applicable to the entire Class
25 with respect to the matters complained of herein, thereby making appropriate the
26 relief sought herein with respect to the Class as a whole.

COUNT ONE
ON BEHALF OF ALL CLASS MEMBERS
FOR “UNLAWFUL” BUSINESS PRACTICES IN VIOLATION OF THE UCL

38. Plaintiff incorporates by reference and realleges each and every paragraph alleged above as though fully alleged herein.

39. California Business and Professions Code § 17200, *et seq.* prohibits acts of unfair competition which includes “unlawful . . . business act[s] or practice[s].”

40. The contractual requirement in Plaintiff and each Arrears Class member’s Membership Agreement forfeiting pre-paid massages when their accounts are not current, constitute void liquidated damages in consumer contracts pursuant to California Civil Code § 1671 subsections (c) and (d), and are therefore “unlawful” business practices in violation of the UCL.

41. Defendant’s contractual requirement in Plaintiff and each Class member’s Membership Agreement forfeiting pre-paid massages in the event of cancellation and/or failure to keep their account current, constitute unconscionable contract clauses pursuant to California Civil Code § 1670.5, and are therefore “unlawful” business practices in violation of the UCL.

42. Defendant’s contractual requirement in Plaintiff and each Class member’s Membership Agreement forfeiting pre-paid massages in the event of cancellation and/or failure to keep their accounts current, breaches the Membership Agreement’s implied covenant of good faith and fair dealing, and is therefore “unlawful” business practices in violation of the UCL.

43. As a direct and proximate result of Defendant’s “unlawful” business practices as alleged herein, Plaintiff and each Class member have been wrongfully deprived of money and/or property. Plaintiff suffered injury-in-fact as a result of Defendant’s forfeiture of her paid massages by being charged, and paying for, unrefunded Massage Envy charges.

1 (ii) it violates established public policy as embodied by California Civil
2 Code §§ 1442, 1670.5 and/or 1671, and the California public policy against
3 forfeitures;

4 (iii) it is immoral, unethical, oppressive, unscrupulous or substantially
5 injurious to consumers;

6 (iv) the gravity of the harm to Plaintiff and the Class outweighs any
7 countervailing benefits to Defendants or to competition.

8 48. As a direct and proximate result of Defendants' "unfair" business
9 practices as alleged herein, Plaintiff and each Class member have been wrongfully
10 deprived of money and/or property. Plaintiff suffered injury-in-fact as a result of
11 Defendants' forfeiture of her paid massages by being charged, and paying for,
12 unrefunded Massage Envy charges.

13 49. Accordingly, Defendant received and is in possession of excessive and
14 unjust revenues and profits, and/or have caused Plaintiff and other Class members to
15 lose money or property directly as a result of Defendant's wrongful acts and
16 practices.

17 50. As a result of the above unfair acts and practices, Plaintiff, on behalf of
18 herself and all others similarly situated, and as appropriate, on behalf of the general
19 public of the state of California, seeks injunctive relief prohibiting Defendant from
20 continuing these wrongful practices, and such other equitable relief, including full
21 restitution of unredeemed massage charges and the disgorgement of all improper
22 revenues and ill-gotten profits derived from their wrongful conduct to the fullest
23 extent permitted by law, and/or reinstatement of forfeited massages. Additionally,
24 Plaintiff requests that the Court award all members of the Class, who were of the
25 attained age of 65 at the time of the Defendants' unlawful forfeiture of massages as
26 alleged herein, to receive a statutory trebling of their restitutionary award pursuant to
27 CAL. CIV. CODE § 3345.

COUNT THREE
ON BEHALF OF ALL CLASS MEMBERS
BREACH OF CONTRACT – VIOLATION OF THE IMPLIED COVENANT
OF GOOD FAITH AND FAIR DEALING

51. Plaintiff incorporates by reference and realleges each and every paragraph alleged above as though fully alleged herein.

52. Plaintiff and each Class member entered into a Membership Agreement with Massage Envy, which contains as a matter of law an implied covenant of good faith and fair dealing to deal honestly, and incorporates by reference all laws applicable to the agreement.

53. Plaintiff and each member of the Class paid Massage Envy monthly membership charges pursuant to the Membership Agreement that they did not use.

54. Pursuant to California Civil Code § 1442, Massage Envy was required to construe its Membership Agreement in a manner that avoids forfeiture of Plaintiff and the Class' pre-paid massages.

55. Massage Envy instituted its forfeiture policies as a method to compel timely payment, penalize non-payment, and as a means to unjustly increase revenue without having to provide massage services (i.e., as a means to generate unfair profits). Defendant had no good faith business rationale for its forfeiture policies.

56. Massage Envy's forfeiture policies are unconscionable because (1) they are inserted by Defendant in a contract of adhesion, with no opportunity for bargaining, presented immediately after Plaintiff and Class members have received a massage, and (2) they are against the public policy of the State of California as embodied in California Civil Code §§ 1442 and 1671, lack mutuality, are completely one-sided in favor of Massage Envy and shock the conscience.

57. Plaintiff and each member of the Arrears Class are excused from using pre-paid massages during the active term of their membership pursuant to California Civil Code § 1671(c) and (d).

1 B. For an order awarding Plaintiff and the members of the Class damages,
2 restitution and/or disgorgement, an injunction prohibiting Defendant's forfeiture of
3 massages, and/or other equitable relief as the Court deems proper, including but not
4 limited to reinstatement of Plaintiff and the Class' paid massages, and the imposition
5 of a constructive trust upon Defendant's revenues resulting from the unlawful and
6 unfair business acts and practices described herein;

7 C. For an order enjoining Defendant from continuing to engage in the
8 unlawful and unfair business acts and practices as alleged herein;

9 D. For treble recovery on all restitutionary awards to senior citizen
10 members of the Class pursuant to CAL. CIV. CODE § 3345;

11 E. For declaratory relief pursuant to the Declaratory Judgment Act, 28
12 U.S.C. § 2201;

13 F. For an order awarding Plaintiff and the members of the Class pre-
14 judgment and post-judgment interest;

15 G. For an order awarding attorneys' fees and costs of suit, including
16 experts' witness fees as permitted by law; and

17 H. Such other and further relief as this Court may deem just and proper.
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1 **VII. JURY TRIAL DEMAND**

2 Plaintiff demands a trial by jury for all of the claims asserted in this Complaint
3 so triable.

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5 Dated: June 19, 2013

Respectfully submitted,

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7 FINKELSTEIN & KRINSK LLP

8 By: /s/ William R. Restis
William R. Restis

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